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No. 72.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

RAYMOND J. FUNKHOUSER and ELMER N. FUNKHOUSER, doing business under the firm name and style of R. J. FUNKHOUSER & COMPANY,

Appellants.

against

J. B. PRESTON COMPANY, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

APPELLEE'S BRIEF

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J. B. PRESTON COMPANY, INC.,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

Appeal by defendants-appellants from a judgment of the Supreme Court of the State of New York, entered March 7, 1933, upon an order of the Court of Appeals modifying a judgment of the Appellate Division, First Department of the said Supreme Court, by restoring to the judgment of the Trial Court entered May 12, 1930, the sum of $14,417.57 interest, which sum the said Appellate Division, upon appeal by appellants, disallowed as not being recoverable under the provisions of Section 480 of the Civil Practice Act, as amended by Chapter

623 of the Laws of 1927 of the State of New York, in effect April 4, 1927.

The Court of Appeals of New York having reinstated the Trial Court's judgment in all respects, appeal here was allowed by the Chief Judge of that Court, with an exception to appellee generally who urges that no Federal question is involved.

Statement.

The breach occurred April 27, 1927, when the defendants, in response to plaintiff's written demand for performance (R. 35-37), indicated their intention to decline further orders, contending they had fully performed (R. 37-39). The Statute became effective April 4, 1927.

The Trial.

The action was tried in the Supreme Court, New York County, before Mr. Justice TOWNLEY, without a jury. The Trial Court's conclusions are set forth in the record (R. 28-35).

The Statute in Dispute.

Section 480 of the Civil Practice Act of the State of New York, as amended by Chapter 623 of the Laws of 1927, in effect April 4, 1927, reads as follows:

> "Interest to be included in recovery. Where *in any* action final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the *total amount* awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the *total amount* awarded, and included in the amount of the

judgment. *In every action now pending or hereafter brought wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, other than a contract to marry, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded.*"

The italicized parts contain the amendment in effect April 4, 1927.

Argument.

This appeal presents two questions: (1) whether or not appellants present here a trial record which entitles them to contend for the unconstitutionality of the Statute (*Cincinnati, etc., R. Co.* v. *Thiebaud,* 177 U. S. 615); and if this Court decides the question has been properly raised, then (2) whether or not, the Statute is unconstitutional.

The Record Insufficient.

There is nothing whatever in the record to show that upon the trial of the action, the defendant contended for the unconstitutionality of the Statute. They did not even contend that the case was one of unliquidated damages. In order to present here the question of the unconstitutionality of the New York Statute, the record would have to show that the Trial Court actually applied the Statute in rendering its verdict. The record does not present such fact. At the end of the trial (R. 25-35) both parties moved for a directed verdict which motion under New York procedural law, forthwith vested in the Trial Court all the prerogatives of a jury (*Island Trading Co.* v. *Berg Bros.,* 209 App. Div. [N. Y.] 63). There-

upon the Court found its damage verdict in plaintiff's favor, adding interest on "$20,256 from December 31, 1923; on $5,926 from December 31, 1924; on $13,770 from December 31, 1925; and on $5,837.70 from December 31, 1926" (R. 33-34). Then addressing counsel, it said, "If counsel will make the necessary computations, I will direct a verdict for that amount" (R. 33-34).

The computation having been made, the Court, thereupon, directed that interest be computed as of a fixed date.

No exception was taken by appellants to the verdict (R. 33-35), nor was any motion made to set it aside and for a new trial (*Barber* v. *Dewes*, 184 N. Y. 548, mem. aff. 101 App. Div. 412 [N. Y.]; *Haines* v. *New York Central, etc., R. Co.*, 145 N. Y. 235; *Cohen* v. *Simon*, 33 Misc. 799 mem. [N. Y.]), nor did the defendants request the Court to indicate whether its interest award was based upon the Common Law as it existed prior to the enactment of the Statute, or, whether it was based upon the Statute. In fact, their conduct at the conclusion of the trial indicated complete acquiescence in the Court's verdict.

It seems to follow that such a record as this fails utterly to meet the rule laid down by this Court in *Cincinnati, etc., R. Co.* v. *Thiebaud, supra.*

Interest, relatively speaking, is a modern creation. Many nations forbade it (*Adriance* v. *Brooks*, 13 Tex. Reports 279). The first Statute passed in England legalizing interest was not enacted until 1545 (37 Henry VIII, Chapter 9). The Common Law, beginning with the enactment of this Statute, is typical in its evolution in allowing interest whenever capable of computation.

Almost four centuries of human progress find both English and American courts extending interest awards in ever increasing instances, as an item of damage until finally a definite rule has been evolved, well stated by an eminent textbook writer on the subject, as follows:

> "Interest is allowed by law only on the ground of a contract, express or implied, or as damages for breach of a contract, or violation of a duty." (Perley on Interest [1893], Chapter 2, p. 5 and cases there cited.)

The evolution of the Common law with respect of interest was recognized by CARDOZO, Ch. J., in *Prager* v. *N. J. Fidelity & Plate Glass Ins. Co.*, 245 N. Y. 1, when, at page 7, speaking for the Court, he said:

> "One marks a growing tendency to make interest an incident when it might once have been excluded (Bernard v. Rochester German Ins. Co., *supra;* Darlington v. Gates Land Co., 151 Wis. 461; General Supply & Const. Co. v. Goelet, 241 N. Y. 28, 29). How far the tendency shall be carried is not before us now."

New York, prior to the Statute, has shown a progressive tendency in allowing interest from the date of breach in contract cases. The so-called Common Law rule of disallowing it, except in liquidated cases, has not been followed there. Recognizing the obvious injustice of a rule that discriminates in the matter of interest against unliquidated damage claims, the Court below has prior to the enactment of the Statute, frequently extended it to unliquidated cases.

Faber v. *City of New York*, 222 N. Y. 255;
Sloan v. *Baird*, 162 N. Y. 328;
Gray v. *C. R. R. of N. J.*, 157 N. Y. 483;
Simon v. *Etgen*, 213 N. Y. 589;
Blackwell v. *Finley*, 233 N. Y. 361;
Prager v. *N. J. Fidelity & Plate Glass Ins. Co.*, 245 N. Y. 1;
White v. *Miller*, 78 N. Y. 393;
De Carricarti v. *Blanco*, 121 N. Y. 230.

So that in New York it cannot be said that any rigid rule controlled the situation. The facts control. If the damages are computable interest was allowed.

The Court of Appeals below describes the condition of the New York law in *Faber* v. *City of New York*, *supra*, at page 262, where it declared:

> "The question of the allowance of interest on unliquidated damages has been a difficult one. The rule on this subject has been in evolution. Today, however, it may be said that if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter have determined what was due, either by computation alone or by a computation in connection with established market values or other generally recognized standards?"

But the New York rule has gone further still. In *Gray* v. *Central R. R. of N. J.*, 157 N. Y. 483, the Court of Appeals below declared that, in unliquidated damage cases, the determination of whether or not the damages can be ascertained, with reasonable certainty, is one of fact for the Trial Court to decide.

It is quite true, as appellants point out, that the Appellate Division below, in its opinion, declared the instant case one in which interest could not have been allowed but for the enactment of the Statute but in view of the Record we cannot concur in the assertion of appellants that this statement of the Appellate Division below constitutes the law of the case because the Court of Appeals did not expressly overrule it.

A careful analysis of the latter's opinion shows it to be divisible into two parts (1) in which it discusses the constitutionality of the Statute involved and (2) its description of the condition of the law of the State as it

existed prior to its enactment. It is after the discussion of both of these questions that the Court said, "The judgment should have included the interest allowed by the trial court". (*Preston* v. *Funkhouser*, 261 N. Y. 140, 146.)

True, it holds the Statute constitutional but it was careful to avoid the conclusion that this was a case where it would not have allowed interest, had not the Statute been enacted. On the contrary, in expressing disfavor with the confusion in the unwritten law it indicated otherwise. Under such circumstances, the Statute, in the opinion of the Court of Appeals below, merely constitutes a restatement and clarification of the law. "A rule of uniformity," declared the learned Court, "must be found to enable justice to be done." The Statute is described only as "a rule of convenience" to prevent the escape "through procedural difficulties from the real obligation to make full compensation for breach of contract." (*Preston* v. *Funkhouser, supra*, 143, 145.)

Therefore, when the New York Legislature, in response to a request by the Court of Appeals below, to clarify the law (*White* v. *Miller*, 78 N. Y. 393, 397), placed liquidated and unliquidated damage cases on the same footing, such an enactment did not change but rather clarified the law.

In view of the foregoing, we urge that before the constitutionality of a Statute of a sovereign State, such as this, is considered, there should be presented a record that justifies assumption of the fact that the case is one not of evolution in the Common Law; that the Statute in question, is one that does not clarify, nor supplement, nor restate but actually writes into the law something definitely and fundamentally new.

The Common Law is a flexible thing. Sometimes it appears to change but in reality it is merely extending its flexible principles to changes in the instrumentalities of modern civilization. Modern law says that interest belongs to the plaintiff.

CARDOZO, Ch. J., in *Prager* v. *N. J. Fidelity & Plate Glass Ins. Co., supra,* 6, speaking on this subject said,

> "If it chose to keep the money, it should pay for what it kept."

Changes in the instrumentalities of civilization have frequently made it possible to award interest in recent cases where, under old methods of computation, damages could not be estimated as of a fixed day with any degree of reasonable certainty. It is in considering such changes in these instrumentalities that the record below is grossly inadequate. For aught that appears, the Trial Court, familiar with the condition of New York law and the tendency of New York Courts to extend the rule followed *Gray* v. *Central R. R. of N. J., supra,* and found that plaintiff was entitled to interest as of a fixed day by reason of the Court's ability to estimate plaintiff's manufacturing costs with reasonable certainty.

Fifty years ago, it was impossible to estimate manufacturing costs with reasonable accuracy. Formerly when damages were proven, manufacturing experts were called to render opinions as to the manufacturing cost (*Snell* v. *Remington Paper Co.,* 102 App. Div. [N. Y.] 138) but today with modern methods of computation, with standardized methods of estimating depreciation and values, damage losses that were once impossible of computation with reasonable accuracy, can now be estimated so as to enable a Trial Court to fix them with reasonable certainty and Plaintiff's Exhibit 21 here (R. 39-50), shows this to be a case where such calculations were successfully accomplished.

In commenting upon this exhibit, the Trial Court declared:

> "Plaintiffs have prepared from their books a statement of manufacturing costs, which has been marked Plaintiff's Exhibit 21. This statement has been

vigorously attacked by defendants, but in my opinion, the evidence shows it to be substantially correct except for the year 1923, when, owing to a destruction of part of the records for that year, it understates the manufacturing cost" (R. 32-33).

In using the words "substantially correct," it indicated accord with the rule laid down in *Faber* v. *City of New York, supra,* that the plaintiff's claim was one for a damage loss which could be ascertained with reasonable certainty as of a fixed date.

True, the Court may have based its award of interest on the Statute involved but the difficulty is that from the record it cannot be stated definitely upon which of these two grounds it reached its conclusion. Since the defendants question the constitutionality of the Statute and now claim that the interest awarded depended exclusively upon it, it was obligatory for them to have called the Trial Court's attention to such contention and particularly to the importance of securing a ruling that would make their record an appealable one.

This, they failed to do.

It follows, therefore, that the determination as to whether this would be a proper case under the law, as it existed prior to the enactment of the Statute in which to allow interest as of a fixed date, with reasonable certainty, was a question of fact to be determined by the Trial Court. Consequently, it is fatal to the contentions of appellants that their record does not show which rule the Trial Court followed, the Statute, or, the prior law. For these reasons despite the opinion of the Appellate Division below, that the verdict is one that could not be arrived at without the application of the Statute, the record disclosing complete acquiescence by appellants in the awarding of interest, the appeal should be dismissed.

Dibble v. *Bellingham Bay Land Co.,* 163 U. S. 63;

Allen v. *Argrumbau,* 198 U. S. 149;
Lowry v. *Silver City,* 179 U. S. 196;
Petrie v. *Wampa,* 248 U. S. 154.

II.

It cannot be successfully contended that the Court below had no power to extend the Common Law rule. The rule is otherwise (*Truax* v. *Corrigan,* 257 U. S. 312, 348).

This being so, since the result is the same, it is immaterial under instant circumstances whether the rule was extended by the Court, or, clarified by the legislature. Moreover, the sustaining of the Statute by the Court below, is tantamount to a decision by that Court extending the interest rule to the instant case.

The purpose of the New York Legislature in clarifying a confused condition of the New York law is a proper exercise by a legislature of one of its most helpful functions, and, therefore, a declaration that this Statute is unconstitutional would operate to relegate the law of New York back in the same condition of confusion that existed prior to 1927. It is not argued that a statute of this character is valid as it affects contracts made subsequent to its enactment, and, since it is of a remedial character, it should not be denied to those whose contracts were made prior to its enactment.

It is difficult to conceive of a Statute that deserves more judicial commendation than the one now before the Court.

III.

If it be assumed that the Court is satisfied it has jurisdiction and that the application of the Statute was essential to the allowance of interest, then appellee contends that the Statute does not impair the obligations of

the instant contract in that interest was allowed as an incident to damages and not as a part of the contract obligation. *A fortiori* when the contract was made, the law implied as one of its obligations, an agreement to pay interest on any damages that might accrue as a result of a breach of such contract in accordance with the procedural law applicable thereto when the action was tried.

The Opinion of the learned and distinguished Chief Judge of the Court of Appeals below is a complete and uncontrovertible answer to appellants' contentions. We hesitate even to amplify it.

With the breaking of the contract, the parties enter a new field, that of remedies, one of which is injunctive, the other, compensatory for damages naturally resulting in consequence of the breach. It is in this new field, the realm of remedies, that we must consider the question as to whether the constitution has been violated by what the Court below declares to be a clarification of the law.

In *Giles* v. *Hart,* 2 Salk. 622, 623, the Court said:

> "Interest is recovered by way of damages, *ratione detentionis debiti.*"

Fargo v. *Davis,* 105 N. Y. 670, holds, that where interest is recoverable as damages for failure to pay money, the *lex fori* governs the rate to be allowed since it is a matter of remedy. To the same effect is *Clark* v. *Child,* 136 Mass. 344.

Bernheimer v. *Converse,* 206 U. S. 516, enunciates the principle that a Statute which increases rather than diminishes the remedies for enforcing a contract is constitutional.

This Court has expressed accord with these views of the law. In *Morley* v. *Lake Shore Railway Co.,* 146 U. S. 162, 168, it said:

"Interest on a principal sum may be stipulated for in the contract itself, either to run from the date of the contract until it matures, or until payment is made; and its payment in such a case is as much a part of the obligation of the contract as the principal and equally within the protection of the constitution. But if the contract itself does not provide for interest then, of course, interest does not accrue during the running of the contract, and whether after maturity and a failure to pay, interest shall accrue, depends wholly on the law of the State, as declared by its Statutes. If the State declares that, in case of the breach of a contract, interest shall accrue, such interest is in the nature of damages, and as between the parties to the contract, such interest will continue to run until payment."

This Court recognizing the power of the State to regulate its own remedial laws, even went so far as to say that where interest has been awarded it can be regulated by the State after judgment. In *Morley* v. *Lake Shore Railway Co., supra,* page 168, it said:

"When such provision is made by statute, the owner of the judgment is, of course, entitled to interest so prescribed until payment is received, or until the State shall, in the exercise of its discretion, declare that such interest shall be changed or cease to accrue. Should the statutory damages for non-payment of a judgment be determined by a State, either in whole or in part, the owner of a judgment will be entitled to receive and have a vested right in the damages which shall have accrued up to the date of the legislative change; but after that time, his rights as to interest as damages are, as when he first obtained his judgment, just

> what the legislature chooses to declare. He has no contract whatever on the subject with the defendant in the judgment, and his right is to receive, and the defendant's obligation is to pay, as damages, just what the State chooses to prescribe."

In perfect line with the foregoing is the case of *Brainard* v. *Jones*, 18 N. Y. 35, 37.

Corpus Juris, Vol. 12, page 1059, states the rule as follows:

> "Interest allowed, not as a matter of contract but as damages for a breach of a contract, is not within the protection of the constitution, and the rate is accordingly subject to change by a statute passed after it begins to run." (Citing Jersey City v. O'Callaghan, 41 N. J. L. 349.)

See also, *League* v. *Texas*, 184 U. S. 156; *Sanders* v. *L. S. & M. S. R. Co.*, 91 N. Y. 641, 642; *Bullock* v. *Boye*, 1 Hoff. Ch. 294; *Bell* v. *Mayor, etc.*, 10 Paige, 49; *Hamilton* v. *Van Rensselaer*, 43 N. Y. 244; *Ritter* v. *Phillips*, 53 N. Y. 586; *First National Bank* v. *Fourth National Bank*, 89 N. Y. 412; *Wilson* v. *Cobb*, 31 N. J. Eq. (4 Stewart) 91; *Sutherland on Damages*, 581, 666; *Salter* v. *Utica & Black River RR. Co.*, 86 N. Y. 401, 403; *Harmanson* v. *Wilson, et al.*, 11 Fed. Cases, Case No. 6074.

Appellants contend that the law regulating interest in force at the time the contract was made was a part of its obligations. This being so, the contract obligation required appellants to pay interest in accordance with the Statutes in force at the time of trial, and the learned Court below held an implied obligation of the contract was to pay interest in accordance with the rules of law existing when the case was tried, and, therefore, it follows that this Statute was comprehended by the contract.

Appellants complain because the change in the law added over $14,000 to their contractual burden. It added nothing to their contractual burden, it added only to the plaintiff's damages by giving to it its interest. Therefore, instead of taking property it restores that which heretofore has been wrongfully retained. The Court below quite properly declared that the Statute "prevents an escape from the real obligation to make full compensation for a breach of contract." *Preston* v. *Funkhouser, supra,* page 145. In others words, its purpose is to save a party damaged from a substantial loss in interest through confusion in the law. The statute does this, nothing more.

IV.

Appellants have not been deprived of any property without due process of law. They have been prevented from retaining plaintiff's property through confusion in the law.

Their contention is effectively answered in *Morley* v. *Lake Shore Railway Co.,* 146 U. S. 162, 171, as follows:

> "The further contention of the plaintiff in error, that he has been deprived of his property without due process of law can be more readily disposed of. If, as we have seen, plaintiff has actually received on account of his judgment, all that he is entitled to receive, he cannot be said to have been deprived of his property and whether or not, a statutory change in the rate of interest thereafter to accrue on the judgment can be regarded as a deprivation of property, the adjudication of the plaintiff's claims by the Courts of his own State must be admitted to be due process of law."

Appellants here have had such adjudication.

In *League* v. *Texas*, 184 U. S. 156, pages 161-2, this Court said:

> "As the State may, in the first instance, enact that taxes shall bear interest from the time they become due, so, without conflicting with any provision of the Federal Constitution, it may in like manner provide that taxes which have become delinquent shall bear interest from the time delinquency commenced. This is adding no novel or extraordinary penalty, for interest is the ordinary incident to the non-payment of obligations."

V.

For lack of jurisdiction, the appeal of appellants should be dismissed, or, in the alternative, the judgment of the Supreme Court and the Court of Appeals of the State of New York, should be affirmed.

Respectfully submitted,

JEREMIAH A. O'LEARY,
Attorney for Appellee.